

**IN THE HIGH COURT OF PUNJAB AND HARYANA AT CHANDIGARH**

**ARBITRATION CASE NO.55 OF 2006**

**DATE OF DECISION: JULY 25, 2007**

**M/S AMAR NATH AGGARWAL CONSTRUCTIONS(P) LTD.**

**.....PETITIONER  
through Mr.P.S.Rana,  
Advocate.**

**Versus**

**M/S PUNJAB ALKALIES & CHEMICALS LTD.**

**.....RESPONDENT  
through Mr. Arun Nehra,  
Advocate.**

**CORAM: HON'BLE MR. JUSTICE VIJENDER JAIN, CHIEF JUSTICE**

- 1. Whether Reporters of Local Newspapers may be allowed to see the judgment?**
- 2. To be referred to the Reporters or not?**
- 3. Whether the judgment should be reported in the Digest?**

**VIJENDER JAIN, CHIEF JUSTICE (ORAL)**

An interesting question has been raised in this petition with regard to appointment of an Umpire or third Arbitrator. The factual matrix of the case are that the arbitration clause between the parties is not in dispute. Pursuant to an agreement entered in the month of November, 1997, in case of dispute, the parties can follow the Arbitration Clause, which is reproduced below:-

**'Arbitration:-**

Except where otherwise provided in the contract all questions and disputes relating to the meaning of specifications, designs, drawings and instructions herein before mentioned and as to the quality of workmanship of materials used on the Works or as arising out of

or relating to the Contract, designs, drawings, specifications, estimates, instructions orders of those conditions concerning the Works, or the execution or failure to execute the same whether arising during the progress of the work or after the completion or abandonment thereof shall be referred to arbitration subject to the provisions of Arbitration Act, 1940 or any Statutory modification or re-enactment thereof and the rules made thereunder and for the time being in force.

Such arbitration shall be conducted by two arbitrators, one nominated by the Contractor and another by the Owner. Arbitrators so appointed shall proceed with arbitration at the place stipulated by the Owner and in case of difference of opinion between the Arbitrators they shall appoint an Umpire within 30 days of arising of difference of opinion. The decision of the Umpire shall be binding on both- the Contractor and the Owner. Cost of procuring the services of the Umpire shall be shared equally by both the parties. The arbitrators shall have power from time to time with consent of the parties to extend the time for making and publishing their award."

They also agreed "f" in case of arbitration:-

*" the Umpire shall be Secretary Industries, Government of Punjab and his decision in this regard will be final and binding on you."*

The arbitration clause was invoked on 30.12.1998 by the petitioner. The petitioner appointed his own Arbitrator and the respondent appointed their own Arbitrator in terms of the Arbitration clause. There was also no dispute between the Arbitrators of both the parties. The

counter claims, statement, evidence were recorded by the Arbitrators. In the year 2001, the petitioner filed an application *inter-alia* praying that in terms of Section 10 of the Arbitration and Conciliation Act, 1996, the Arbitrator Tribunal cannot be of even numbers and third Arbitrator is required to be appointed which can now be appointed by mutual consent of both the Arbitrators preferably an Engineer as the claimants have no objection if the evidence recorded is considered. On this application, two separate orders have been passed i.e. Annexure R-9, which is at pages 97-105 and Annexure R-10, which is at pages 107 to 117. The Arbitrator appointed by the petitioner formed the opinion:-

“That the application for appointment of third Arbitrator is maintainable who is to be appointed by the Arbitrators already appointed by the parties and the Umpire agreed upon by the parties cannot be appointed as the third Arbitrator as prayed for by the respondent company. The application is, thus, decided accordingly.”

The Arbitrator appointed by the respondent formed the opinion that:-

“I see force in the arguments of the learned counsel for the P.A.C.I.-respondents and do not agree with the learned counsel for the Company claimants. The position of the Umpire under the old Arbitration Act, 1940 was that of an Arbitrator. So, the contended abolition of the institution of Umpire under the new Arbitration Act, is of little significance in the present case. Through the incorporation of clause-6(f) in the letter of indent dated 06.11.1993, in the course of negotiations by the parties, they are to be deemed to

have appointed the third arbitrator by mutual consent. In this view of the matter the provisions of Section 11(3) of the new Arbitration and Conciliation Act, 1996, which come into play failing any agreement between the parties regarding the procedure for appointing the arbitrator or arbitrators, are not attracted in this case and, therefore, no question of appointing the new third Arbitrator by the Arbitrators and, therefore, the application of the petitioner was dismissed.”

It is in this view of the matter that the present application has been filed for appointment of third Arbitrator to act as a Presiding Arbitrator in terms of Section 11(6) of the Arbitration and Conciliation Act.

Learned counsel appearing for the petitioner has contended that under the 1940 Act, Section 10 envisaged that in case of an appointment of third Arbitrator, one was to be appointed by each party and third by the two Arbitrators. Section 10 of the Act is to the following effect:-

**“Section-10:- Provisions as to appointment of three or more arbitrators:-**

**(1)** Where an arbitration agreement provides that a reference shall be to three arbitrators, one to be appointed by each party and the third by the two appointed arbitrators, the agreement shall have effect as if it provided for the appointment of an umpire, and not for the appointment of a third arbitrator, by the two arbitrators appointed by the parties.

**(2)** Where an arbitration agreement provides that a reference shall be to three arbitrators to be appointed otherwise than as mentioned in sub-section(1), the

award of the majority shall, unless the arbitration agreement otherwise provides, prevail.

**(3)** Where an arbitration agreement provides for the appointment of more arbitrators than three, the award of the majority, or if the arbitrators are equally divided in their opinions, the award of the umpire shall, unless the arbitration agreement otherwise provides, prevail.”

It has been contended on the basis of aforesaid Section that these provisions are no more in existence under the new Act. Reliance was also placed on Rule 2 and 4 of the First Schedule framed under 1940 Act. Rules 2 and 4 are to the following effect:-

“**2.** If the reference is to an even number of arbitrators, the arbitrators shall appoint an umpire not later than one month from the latest date of their respective appointments.”

“**4.** if the Arbitrators have allowed their time to expire without making an award or have delivered to any party to the arbitration agreement or to the umpire a notice in writing stating that they cannot agree, the umpire shall forthwith enter on the reference in lieu of the arbitrators.”

The aforesaid rules cited by the counsel for the petitioner were under the old Act with regard to the appointment of third Arbitrator as umpire, and are not in existence in the Act of 1996. Learned counsel for the petitioner further contended that pursuant to Section 11(2) subject to sub-section (6), the parties are free to agree on a procedure for appointing the arbitrator or arbitrators. Sub-section 3 of Section 11, provides that failing any agreement referred to in sub-section

(2), in an arbitration with three arbitrators, each party shall appoint one arbitrator, and the two appointed arbitrators shall appoint the third arbitrator who shall act as the presiding arbitrator.

On the basis of aforesaid provisions of 1996 Act, it was contended that as the difference of opinion has surfaced between the Arbitrators and no Umpire is visualize under the new Act, the presiding arbitrator has to be appointed. As the two arbitrators have not agreed to appoint the third arbitrator i.e. the Presiding Arbitrator and there is no possibility of agreement on a common name, this Court must supply the vacancy of the presiding arbitrator.

On the other hand, learned counsel for the respondent has contended that having participated in the arbitration proceedings from 1998 till 2001, no disagreement has ever surfaced between arbitrators. The application filed by the petitioner was under the garb of new Arbitration and Conciliation Act, 1996 and was not maintainable. It was further contended that the parties by the mutual consent has agreed for appointment of an umpire under the agreement and that umpire can be the third Arbitrator. Since the position and power of the umpire are not reflected in the new 1996 Act, the persons so named as umpire in the agreement could work as the third Arbitrator or the Presiding Arbitrator.

I have given my careful consideration to the arguments advanced by both the learned counsel for the parties.

On the first brush, the arguments of the learned counsel for the petitioner did appeal me but after careful scrutiny of the purpose for which Arbitration and Conciliation Act, 1996 has been enacted, I do not think that there is substance in the arguments of the petitioner. No doubt, the legislature in his wisdom has made applicable, neither Section 10 of 1940 Act, nor Rules 2 and 4 mutatis-mutandis under the new Act, but the very object of enactment of 1996 Act was to have a mechanism for resolution of

disputes in a speedy manner. Therefore, when the parties have agreed in the agreement to have a named umpire under the old act, they cannot press in to action any other provision under the new Act to say that the Court has to supply the vacancy for third Umpire or the Presiding Arbitrator. Under Section 11(2) of new Act provides that parties are free to agree on a procedure for appointing the Arbitrator or Arbitrators. These words are of importance. Under the agreement, parties had agreed for a procedure for appointment of Arbitrators as well as in the case of a difference of opinion between the arbitrators for appointment of umpire. With the enactment of the new act that umpire has to be read as third Arbitrator or the Presiding Arbitrator. Once the parties by mutual consent consciously have agreed to the procedure, this Court will be reluctant to supply the vacancy on its own by appointing the third Arbitrator/Presiding Arbitrator as contemplated under the new act, and the Secretary, Ministry of Industries, Punjab will act as the third Arbitrator, as has been agreed in the agreement.

The petition stands disposed of.

**July 25, 2007**  
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**(VIJENDER JAIN)**  
**CHIEF JUSTICE**